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Published in:
European Journal of Social Security

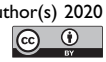
DOI:
10.1177/1388262720971297

Publication date:
2020

Article

EJSS

European Journal of Social Security
2020, Vol. 22(4) 376–389



DOI: 10.1177/1388262720971297
journals.sagepub.com/home/ejs


The human rights approach to social assistance: Normative principles and system characteristics

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Abstract
This article deals with the substantive meaning of the human right of social assistance. The central question is how normative human rights principles can be reconciled with system characteristics which are part of the practical reality of social assistance law and administration. In order to answer this question, we present illustrations of how the human right of social assistance has been operationalised, with a particular emphasis on the judgments and opinions of courts and quasi-judicial institutions. What emerges is that the meaning of the human right of social assistance is not fixed or to be found in some natural law abstraction. It is organically created in the process of confronting human rights principles with the system characteristics of social assistance. Drivers of this process are, *inter alia,* the principles of a universal material minimum subsistence level, a dignified life for social assistance recipients, and a rights-based approach.

Keywords
Social assistance, human rights, social and economic rights, minimum income protection, Social Europe, poverty

1. Introduction

This article deals with the human right of social assistance. A previous publication by Vonk and Olivier gave a broad overview of the fundamental right of social assistance and examined the legal consequences of the right when it is relied on in national courts. It was observed that from a legal

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perspective the added value of the human right of social assistance lies in the possibility for an individual to address structural short comings in the existing architecture of social assistance schemes.[1] In this article we will look more closely at the substance of this case law, focusing in particular on cases at the international, regional, and national levels. Central to this analysis, is the question of how courts deal with the inherent tension between a rights-based approach on the one hand, and the strict the benefit conditions that are in the reality of social assistance.

Social assistance regimes operate with many obligations and few rights. Historically speaking, social assistance schemes are the successors of the previously existing poor relief institutions that were in place in most of the western world long before 20th century. During the course of the industrial revolution the then existing poor laws developed a distinctly repressive flavour. Its history with the separation of the able- and non-able-bodied, the work houses, the 'less eligibility', the disciplinary measures, arbitrary decision making, and stigma, is well documented.[2] Even though the contemporary notion of social assistance has rejected the idea of charitable state aid and replaced this with the recognition of personal rights to support for a person's livelihood,[3] the legislative regimes bear traces reminiscent of its repressive past. As a result, to a large extent the unhappy qualification of 'rights of the poor as poor rights' still characterises the legal position of social assistance beneficiaries.

The restrictive nature of many system characteristics leads to a paradoxical situation for the realisation of human rights. The social assistance system advances these rights by creating a safety net for the neediest, yet it may do so to the detriment of other rights and the dignity of the individual recipients of support. It is this tension which leads us to the question: how can normative human rights principles be reconciled with system characteristics which are part of the practical reality of social assistance law and administration?

The answer to this question not only reflects upon the substantive meaning of the human right of social assistance, but it also provides us with a critical perspective on the human rights approach itself. In our view, an approach which turns a blind eye to the system characteristics runs the risk of developing into an aspirational wish list which is detached from reality; it may also overlook the specific contribution that social assistance can provide to the realisation of socio-economic fundamental rights. For this reason, it is interesting to find out if human rights doctrine, and in particular human rights case law, takes system characteristics into account and what techniques are employed in this process. Consideration of the extent to which social assistance is a rights-based entitlement is also vital for the future of the fight against poverty, as the rights-based approach could be a powerful tool for limiting social exclusion and establishing a social minimum.

This article is not intended to be an exhaustive study, but aspires to provide illustrations of how the human right of social assistance might be operationalised, with a particular emphasis on the judgments and opinions of courts and quasi-judicial institutions. In order to obtain a broad view of the techniques employed in the (quasi-) judicial process, we made a selection of three landmark cases taken from the international, regional, and the national spheres. The international level is represented by a decision of 26 March 2018 of the Committee on Economic, Social, and Cultural Rights (CESCR) in the case of *Marcia Cecilia Trujillo Calero v. Ecuador*. This is the first decision

1. Vonk and Olivier (2019).
2. There are many national studies. For a broad comparative perspective: Lindert (1998). For a more prosaic description, one should read George Orwell's *Down and Out in Paris and London*, first published in 1933.
3. Marshall (1950).

of the CESCR made under the complaints mechanism established by the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which found a violation regarding the right of social assistance under Article 9 of the ICESCR. The regional level is represented by two related decisions of the European Committee on Social Rights (ECSR); *FEANTSA v the Netherlands* and *CEC v the Netherlands*. Both cases deal with exclusive eligibility conditions for irregular immigrants and for persons without local connection. Finally, the national level is represented by the pivotal judgment of the German Federal Constitutional Court (*Bundesverfassungsgericht*) of 5 November 2019 which reflects on the compatibility of the German work sanctions regime with the constitutionally protected minimum subsistence norm (*Existenzminimum*).

This article will first describe some of methods that have been employed to identify system characteristics of social assistance (section 2). Then we move on to giving a summary of the normative framework of the human right of social assistance (section 3). This is followed by an analysis of the three cases referred to above, with a focus on how the (quasi-) judicial bodies reconcile system characteristics with requirements following from the human right of social assistance (section 4). We conclude the article with a reflection on the merits of various approaches adopted in human rights case law to deal with system characteristics: ignoring, discussing, curbing or fundamentally challenging? (section 5).

2. Social assistance: System characteristics

Defining social assistance and mapping out its system characteristics is not an easy task. Often this is done in studies which aim to offer a comparative analysis of the effectiveness of minimum income protection systems in groups of states.

An example of such an attempt is the study carried out by Eardley et al (1996); a comparative study of 24 OECD countries social assistance schemes. The study attempted to identify types of social assistance and categorised countries accordingly, not unlike the typology of the welfare state created by Esping-Andersen in his famous work on the three worlds of welfare capitalism.[4] The 'types' identified by Eardley et al (1996) were: selective welfare systems, the public assistance state, welfare states with integrated safety nets, dual social assistance, citizenship-based but residual assistance, rudimentary assistance, and decentralised discretionary relief.[5] These types were essentially derived from the differences in the system characteristics across the states that were surveyed.

The system characteristics are the indicators on which a number of other comparative studies are based, though the characteristics selected for comparison will vary depending on the objectives of the study and how the researchers are defining social assistance. For example, an extensive comparative study by Bahle et al. entitled 'The last safety net' compares minimum income protection systems in Europe which are based on a means test, and which aim to guarantee a social minimum. Their definition of minimum income protection systems excludes tied benefits, such as housing benefits (they do not aim to cover all the basic needs of a person, just costs relating to a specific need), universal non-contributory benefits such as basic pensions (as these are not means-tested), and wage related benefits (these are aimed at guaranteeing individual living status

4. Esping-Anderssen (1990).
5. Eardley, Bradshaw, Ditch and Gough, (1996).

rather than a minimum).[6] Such a definition of minimum income protection is narrow, but narrow definitions such as this one may be better suited for some comparative purposes, and also serves as an effective definition of the term social assistance. In contrast, the study from Eardley et al employed a far broader definition of social assistance and as such examined a wider range of system characteristics that did, for example, include tied benefits.

While the definitions in various studies may differ, there are recurring characteristics which can be seen as common denominators (or the hard core) of the majority of social assistance schemes. These are characteristics that appear in the notion of social assistance as developed, *inter alia,* by the ECSR with reference to the right to social assistance as embodied in Article 13 European Social Charter (ESC). As will be explained below, these characteristics are: general (i.e. not referring to any specific social risk), non-contributory (i.e. not based upon the fulfilment of periods of insurance and tax financed), needs-based (i.e. means-tested) minimal benefits (i.e. not higher than the recognised minimum subsistence level).

The details of these characteristics are laid down in social security law of states. To the best of our knowledge, a comprehensive general comparative study which tackles the subject of social assistance from a legal point of view does not exist. But we do have country information as part of legal analyses carried out for specific purposes, such as on activation measures,[7] sanctions,[8] decentralisation[9] and the treatment of non-nationals.[10] From the corpus of all this research a number of additional, qualitative characteristics emerge as key features of schemes that can be branded as social assistance in the above sense of the word. Reference can be made to, *inter alia*: a strict household means test (taking into account income and capital with little or no thresholds); a strict work test (duty to accept all kinds of paid or even unpaid employment); harsh sanctions (for those who do not adhere to work and co-operation duties); wide discretionary powers (for case managers as well as for local authorities charged with the governance administration of social assistance); and the exclusion of outsiders (on the basis of a nationality/immigration status test, sometimes supplemented by a local connection test).

3. The human right of social assistance: International normative framework

In a broad overview of the human right of social assistance published in 2019, it was observed that there is a growing consensus in international human rights law that governments should work towards a universal safety net which can be accessed by individuals by means of a right.[11] In this context, we referred to a fortified government obligation within the broader right to social security, which stems from the role that social assistance fulfils as the last safety net in the system of social security as a whole. We also concluded that this emerging normative consensus merely exists on an abstract level. As soon as the notion is translated into more concrete standards, the consensus starts to falter.

6. Bahle, Hubl and Pfeifer (2011).
7. For example: Daguerre (2007).
8. For example: Eleveld (2016).
9. For example: Vonk and Schoukens (2019).
10. For example: Kramer, Thierry and Van Hooren (2018) Martinsen, Rotger and Thierry (2019).
11. Vonk, G and Olivier, M. (Supra note 1, 2019).

Human rights do not express a preference for specific designs of social assistance. It may be argued that such preference is not desirable.[12] A wide margin of discretion allows for flexibility, allowing countries to adjust their programmes to their own needs and political priorities. Yet this does not mean to say there is no need for further substantive guidance as to the meaning of the human right of social assistance. If the human right of social assistance remains too abstract, it runs the risk of being merely an expression of a tautology (social assistance is a universal safety net) or of becoming a platform for echoing the well-known human rights catechism (non-discrimination, non-retrogression, adequacy, availability, accessibility etc.) without adding anything specific that may be of use for social assistance law and policy.

At the global level, specific normative standards for social assistance are notably absent. This also applies for General Comment No. 19 which provides an elaborate interpretation of the right to social security as formulated in Article 9 of the ICESCR. Neither do we find any standards in ILO Recommendation 202 on national floors of social protection.[13]

More standards do exist at the regional level. In particular, reference must be made to the work of the ECSR, the supervisory body and complaint authority for the ESC. Through the reporting mechanism and collective complaints procedures, the ECSR has been fed for years with bottom-up system information about state practices in the social field of European countries. The cumulative responses to the national reports in the form of Committee findings, as well as the Committee's decisions in complaints procedures, have resulted in the development of a truly normative framework in respect of the various areas that are covered by the social rights contained in the ESC. This framework is contained in a document dating back to 2008 and updated to 31 December 2018, the *Digest of the Case Law of the European Committee of Social Rights.*[14]

The Digest also contains an explanation of the interpretation of the right of social assistance set out in Article 13 ESC.[15] It is a ten-page exegesis, not legally binding in the formal sense of the word, but nonetheless an authoritative source of interpretation. In our view this exegesis is the only collection of human rights based normative standards on social assistance, taking into account and reflecting upon the legal and administrative realities in the contracting states.

On the concept of 'social assistance', the ECSR tries to steer clear of the controversial issue regarding the difference between social security and social assistance by using its own definition:

> '. . . benefits for which individual need is the main criterion for eligibility, without any requirement of affiliation to a social security scheme aimed to cover a particular risk, or any requirement of professional activity or payment of contributions (. . .).'[16]

A number of other interesting observations on the ECSR approach to social assistance can be made based on the Digest. The *personal scope* of social assistance, according to the ESCR, is

12. General Comment 19 in fact advises that measures which may be used to provide social security 'cannot be defined narrowly' (para. 4).
13. The 2012 ILO Recommendation No. 202 on national floors of social protection contains some references to social assistance as an instrument to achieve a minimum level of protection (e.g. in paragraph 9(3)) but further substantive requirements are absent.
14. Council of Europe (2018), available at: https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80 (accessed 19 March 2020).
15. For a schematic overview see: Dalli (2020).
16. Council of Europe (note supra 14, 2018:143).

universal, with every individual being covered on account of their needy situation.[17] This does not exclude additional schemes which might provide extra protection for worthy groups such as the elderly and unemployed, but means that all those even outside of these vulnerable groups should have access to a general safety net. The ECSR has also developed standards on the *level and duration* of social assistance, considering appropriate assistance to not be below 50% of the median equivalised disposal income calculated on the basis of the Eurostat at-risk-of poverty threshold, and stating that assistance must simply continue as long as the need still exists.[18] This level can be affected by *sanctions,* which the Committee considers permissible so long as they are reasonable and consistent with the objective being pursued. They must additionally be shown not to deprive those concerned of their means of livelihood and it must be possible to appeal against a decision.[19] Finally, the ECSR sets out a number of standards concerning the legal status of non-nationals. It is considered permissible for European states to use minimum periods of residency for the right to equal treatment, but not when it comes to providing emergency assistance to those in need. Emergency assistance should be provided to all, with the understanding that it does not concern the provision of regular minimum benefits, but forms of assistance intended to relieve the emergency situation. The ECSR has issued a number of important rulings in collective complaints procedures about the right to emergency assistance for foreign nationals who do not have legal residence, in particular asylum seekers who have exhausted all legal remedies,[20] two of which will be discussed below.

The Digest of Case Law offers a unique and valuable source of human rights based normative standards. The standards promote the development of the safety net, for example by setting a certain minimum level of benefit the systems should adhere to; a useful reference point for a potential EU directive on Minimum Income.[21] They also confront restrictive criteria dealing with, for example, the means test, work obligations, and sanctions. In doing so, they are remarkably concrete and specific. A disadvantage of the Digest is that the texts are rather apodictic. Although the Digest contains some general information on the fundamental principles of interpretation of the Charter, the standards themselves are not very rich with content based on human rights doctrine or underlying legal justifications. As a result, we are left in the dark as to why the right of social assistance gives rise to these particular interpretations. So, while global documents such as General Comment no. 19 of the ICESCR, are very rich on human rights doctrine without giving much system guidance, the Digest is full of system guidance without any human rights doctrine. Providing underlying legal motivations with theoretical notions was clearly not the intention of the authors.

Another characteristic of the document is that the standards are all formulated as absolute requirements instead of elements which are taken into consideration when judging the justification of certain restrictive criteria or insufficient levels of protection found in the social assistance

17. Ibid.
18. Ibid, pg.146.
19. For more about this test, see: Eleveld (2016).
20. ECSR, *Defence for Children International v The Netherlands, application no 47/2008 (2009) ECSR; Conference of European Churches v The Netherlands,* Application No 90/2013, 2 July 2014; ECSR, *European Federation of National Organisations Working with the Homeless (FEANTSA) v The Netherlands,* Application No 86/2012, 1 July 2014.
21. The potential for a European Minimum Income Directive is discussed in detail in the contribution of Ane Fernandez de Aranguiz.

schemes of the European states. While for some this may have the charm of clarity and legal certainty, there is also the risk of rigidity and a lack of responsiveness to change. [22]

4. Review of case law

4.1 CESCR 26 March 2019, communication 10/2015 (Marcia Cecilia Trujillo Calero v. Ecuador)

The first case to be discussed was dealt with by the CESR through the complaint mechanism under the Optional Protocol to the ICESCR (OP-ICESCR).[23] This mechanism itself is still young, with many of the first cases being ruled inadmissible on grounds of *ratione temporis.* Nevertheless, the decisions that have been made do allow for a first assessment as to how the CESR approaches the judicial process. According to Liebenberg, an analysis of the jurisprudence generally indicates that the Committee mediates around a number of presumptions and burdens of proof for extracting accountability from States Parties; failures to ensure the required standards constitute *prima facie* breaches of the Covenant, which must be rebutted by the States by producing evidence and arguments to support the reasonableness of their policy choices.[24]

In this particular case, there was an alleged violation of the right to social security (Article 9 ICESCR) due to a denial of the applicant's pension. The case was essentially about the refusal to pay Ms Calero's pension based on the fact that she had an eight-month gap in her voluntary contributions which she did in fact make up for later, and a refusal of a special pension application on the grounds that she had not made enough contributions.[25]

According to the CESCR, the failure to grant Ms Trujillo Calero her pension amounted to a violation of the right to social security of Article 9 ICESCR. The CESCR took a range of arguments into account in order to reach this conclusion. Of particular significance, was the lack of any non-contributory component to the pension system, which deprived Ms Trujillo Calero of a pension safety net. According to the Committee, Article 9 ICESCR oblige Parties to establish non-contributory schemes or other social assistance measures to provide support to those individuals and groups who are unable to make sufficient contributions for their own protection.[26] This is considered to be a minimum core obligation. In the absence of a non-contributory scheme, Ms Trujillo Calero had nothing to fall back upon in case of a lack of required contribution payments, which was considered one more reason why in this particular case there was a breach of Article 9 ICESCR.

So how does the approach taken by the CESCR take into account system characteristics? The reply is mixed. On the one hand this case is a proactive one; it would have been possible to stick to the facts and only make a finding based on the exclusion of the applicant from the pension scheme, without questioning the very structure of the Ecuadorian social security system. However, the

22. Which can easily lead to complaints that the criteria are not complete and up-date, such as voiced by María Dalli. See: Dalli (2020).
23. UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 5 March 2009, A/RES/63/117.
24. Liebenberg, S. 'Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol', *Human Rights Quarterly* (2020) 42(1) 48- 84
25. CESCR, *Marcia Cecilia Trujillo Calero v. Ecuador*, Communication 10/2015, 26 March 2018, para 2.1-2.10.
26. Ibid. para. 14.1.

CESCR chose to go further in taking the lack of a non- contributory safety net into account, not only in its reasoning on the breach of Article 9 ICESCR but also in one of its recommendations to 'formulate within a reasonable time, to the maximum of available resources, a comprehensive and complete non-contributory benefits plan'.[27] On the other hand, the decision of the CESCR is rather short on content describing what the non-contributory approach is and how it could be of any use to the elderly without sufficient means. The recommendation refers to non-contributory benefits specifically for the elderly, but the CESCR's decision also refers to the more general obligation to provide non-contributory benefits as included in paragraph 50 of General Comment No. 19. Should Ecuador prioritise the introduction of a non-contributory pension scheme over the development of a universal social assistance safety net? The Committee shows particular concern for the effects of the absence of a non-contributory pension scheme for women. But if this is the core problem of the case, then why should Ecuador not address this problem through more conventional technical means, such as the recognition of fictitious insurance periods and a more relaxed regime for continued voluntary insurance?

In short, the CESCR took a bold step in confronting a fundamental system flaw, then failed to make use of the opportunity to roll out a more comprehensive view on the non-contributory approach to social security which goes beyond the comfort zone of General Comment No. 19. Interestingly, this approach cannot fully be explained by the CESCR's reverence for the national margin of appreciation because a recommendation to develop a comprehensive and complete non-contributory benefits plan is, in itself, quite specific and penetrating.

4.2 ECSR 02 July 2014, Case 86/2012, the European Federation of National Organisations working with the homeless (FEANTSA) v. the Netherlands and 1 July 2014, Case and 90/2013, Conference of European Churches (CEC) vs the Netherlands

These two cases, while not officially joint cases, are similar enough to be considered as such. Both cases concerned complaints from NGOs which challenged the exclusion of certain vulnerable groups from basic shelter and emergency assistance. The complaints challenged these exclusions as being incompatible with a number of related Articles of the ESC, including the right of social assistance as included in Article 13.

In the *FEANTSA* case, the complaint alleged that the Dutch legislation and policy regarding the securing of emergency shelter for the homeless was not compatible with the Charter.[28] The *CEC* case made a similar complaint but was more specific, focusing on the violation of the rights of irregular migrants, in particular failed asylum seekers, under Articles 13 and 31 ESC.[29] Violations were found in both cases.

In contrast to its Digest of Case Law discussed in section 3, in these two decisions the ECSR did make an attempt to embed its findings in a broad theoretical human rights framework. There were elaborate references to global human rights standards and their official interpretation as well as references to case law of the European Court of Human Rights and to relevant EU law. When it came to the material findings on violations of the respective Articles of the ESC, these theoretical

27. Ibid, para. 23
28. *FEANTSA v the Netherlands* (supra note 20) paras. 18-19.
29. *CEC v the Netherlands* (supra note 20) para. 14

considerations mostly boiled down to references to the principle of human dignity, as a general notion underlying all human rights.

The cases show a high degree of scrutiny of the Netherlands' legislation on social assistance and social care. System characteristics were described in detail and careful consideration was devoted to the question of how these relate to the specific requirements following from the respective Articles of the Charter, including Article 13, as formulated by the ECSR in earlier case law. The assessments dealt with the human rights compatibility of the system as a whole, which is to be expected in a collective complaints procedure which does not concern the violation of an individual's right in a particular case.

In the *FEANTSA* case, the primary concern was that the system of social assistance, particularly emergency social assistance, was inadequate because Dutch law allowed for variations in the application of its policy across provinces. As it turned out, in practice many municipalities excluded outsiders on the basis of a local connection test, even though the national guidelines prescribed national coverage. However, the ECSR was of the opinion that a decentralised system of administration should not deprive claimants of their fundamental rights the Netherlands had committed to in the ESC.[30] This is an example of the Committee applying the principle of universality to the Netherlands' system of decentralisation and processes of further localisation. The fact that the complaint concerned emergency shelters, was conducive to this. With regards to emergency assistance, the Committee has consistently stated that emergency assistance must be available to foreigners, even if they do not legally reside in the country.[31] As such, this was another reason that the Dutch law on the matter was considered to be incompatible with the charter.

In the *CEC* case, the primary issue raised by the Committee concerned the Dutch Aliens Act, and how immigration status restricted the scope of application of the Dutch social assistance system, with adverse effects for particular groups such as failed asylum seekers. The Dutch government did not deny that the social assistance system excluded irregular immigrants, but argued that this group cannot invoke the protection of the ESC. This argument refers to the Appendix to the ESC of 1996, according to which, Article 13 applies to foreigners only in so far as they are nationals of other Parties, lawfully resident, or working regularly within the territory of the Party. Ultimately, the state's argument for limiting the scope of application of the Charter was rejected in view of the fundamental human rights principle of human dignity.[32] A categorical exclusion of any form of assistance, in particular discretionary emergency support, would have the effect of depriving irregular immigrants of every form of livelihood when they are most dependent on it. This is an example where the reference to the principle of human dignity is not reduced to a mantra, but functional for reaching a judgment on the legality of a certain social assistance system characteristic.

Interestingly, the Dutch government never fully adhered to the *CEC* decision, but this is not out of touch with the quasi-judicial collective complaints procedure which results in legally non-binding decisions. The *FEANTSA* and the *CEC* cases have resulted in serious government introspection into the treatment of the homeless and irregular immigrants in the Netherlands' social assistance and support system.[33]

30. *FEANTSA v the Netherlands* (supra note 20), para. 112 – 115.
31. Digest of the case law of the ESC (supra note 14). pg.152-153
32. *CEC v the Netherlands* (supra note 20) para. 66.
33. Under the current state of affairs, failed asylum seekers do not qualify for state support but are offered accommodation in a centre which prepares them for leaving the country and which prohibits them from crossing the municipal

4.3 Bundesverfassungsgericht *5 November 2019, 1 BvL 7/16 (sanctions and social assistance)*

On 5 November 2019, the German constitutional court, the *Bundesverfassungsgericht*, delivered a judgment in a long-awaited case regarding sanctions for jobseekers' assistance (*Arbeitslosengeld II*).[34] The case is a test case for both the human right of social assistance and increasingly strict social assistance policies, not only in Germany but also in other European countries. This is because the German Constitutional Court has explicitly recognised a right to a subsistence minimum, the so-called *Existenzminimum*, and is willing to critically test whether sanctions are fully consistent with this principle.

The case was brought by an assistance recipient from Erfurt in former East Germany. He declined a job offer as a warehouse clerk because he wanted to look for other work in sales. His benefit was then cut by 30%. When he subsequently also refused to take advantage of a training offer for sales staff, the penalty was increased to 60% of the assistance standard. These penalties are the result of a tightening of the sanction mechanism in social assistance implemented in 2011. The sanctions are mandatory and increase if the violation of the work rules is repeated, from 30%, to 60%, to 100% over a maximum duration of three months.

The case resulted in a lengthy judgment (62 pages), which is not unusual for decisions made by constitutional courts around the world. For our purposes, the judgment is particularly interesting because of the systematic way the two dimensions of normative principles and systems characteristics are confronted with each other.

With regard to the system characteristics, the judgment provides a detailed overview of the applicable legal rules and their historical background. But the analysis goes further than that by also taking consideration of the effectiveness of the sanctions in the empirical sense of the word. The Court assumes a duty of the government to regularly examine the effects of the sanction regime in terms of norm compliance, but it was found that a comprehensive examination to this effect had not been carried out. Existing studies were deemed to be inconsistent in their methods, representativeness and outcome. Moreover, some of these studies rather pointed towards the conclusion that sanctions may be counter-productive for the social reintegration of unemployed individuals in that they may push vulnerable people into isolation.[35]

With regard to the theoretical background of the right to a minimum subsistence, the Court recalls its previous case law in which this right was developed drawing from Article 1(1) of the Constitution, which addresses the inviolability of human dignity; and Article 20(1), which formulates the so-called social state principle. It refers to a set of obligations of the state to support all individuals who do not have the required means to cover their subsistence costs, not only in terms of the physical existence of the individual. This covers the means necessary for food, clothing,

boundaries where the centre is located. This is not considered to be contrary to the ECHR, see ECtHR, *Hunde v. the Netherlands,* Application no. 17931/16, 28 July 2016.

34. BVErG, 5 November 2019, ECLI: DE: BverfG, BvL 7/16. For an extensive case note in the English language, see: Gantchev (2019a). Further by the same author are included: Gantchev (2020).

35. The Court carried out an extensive review of available research on the effectiveness of sanctions, and while finding there was no clear academic consensus, acknowledged that while some studies did find there to be benefits related to sanctions, such as a higher chance that recipients will comply with conditions, there was also a wealth of research about the negative effects of sanctions. However, the court did find that there seemed to be a higher consensus that very high sanctions had overall negative effects, and were not proven to be more effective than lower sanctions. See ibid considerations 57-67 and consideration 199.

accommodation, heating, hygiene and health, and also the costs associated with an individual's ability to participate in social, cultural and political life. The Court expands upon these normative notions in a manner which responds to the contemporary policy debate on workfare and sanctions. Thus, in relation to the principle of human dignity, the Court emphasises that this principle is not reserved only for persons of certain social status or to those who adhere to their obligations. '*Sie muss nicht erarbeitet werden, sondern steht jedem Menschen aus sich heraus zu*'.[36] In other words, people do not have to earn their right to human dignity. This casts a shadow over the narratives of reciprocity which are becoming increasingly popular to defend strict welfare conditionality.[37]

The Court prescribes a strict proportionality test in order to bridge the tension between sanctions and the right to a minimum subsistence. Although it is permissible to create a system of work sanctions, such a system should make allowances for cases of extreme hardship[38] and a possibility of ending the sanction if people improve their lives and still fulfil their obligations. Furthermore, the Court considers that the fundamental right to a subsistence minimum is violated if cuts of more than 30% of the standard of assistance are imposed. A higher sanction would only be justified when an immediate and appropriate offer is made that would release someone from social assistance.

The judgment shows that the human right of social assistance may lead to concrete results and incremental improvements of the position of benefit recipients. In this particular case, the Court gave a strict order on the basis of which, pending legislative change, job centres are obliged to apply the law in such a way that it respects the requirements contained in the judgment.

5. Conclusions

This contribution has addressed how (quasi-) judicial institutions operationalise the human right of social assistance. If it was a sort of contest, one could say the CESCR is strong in human rights exegesis, the ECSR is strong in tackling system realities, while the *Bundesverfassungsgericht* is strong in balancing both dimensions. But such an observation does not do justice to the different positions of the judicial institutions and the context in which they operate. For example, it is to be expected that the CESR is focusing more on the development of a non-contributory social safety net, in a global context where such safety nets are mostly absent. Conversely, in countries such as Germany where a comprehensive social safety net has come into being, it is to be expected that courts would pay more attention to the details of such a system.

What is more interesting is how the cases reflect upon the substantive meaning of the human right of social assistance. What emerges is that this meaning is not fixed or to be found in some natural law abstraction, but is constantly created almost like an autogenetic process, when the human rights principles are allowed to be confronted with changing system reality.

Different drivers of the human rights approach have come to the fore. Human dignity is the main one. This gives rise to a need to guarantee a universal material subsistence level, which was at stake in for example the *CEC* case. Gender may play a role in this respect, as was visible in the *Trujillo Calero* case in which a non-contributory old-age pension was considered to be conducive to ensuring support for elderly women. Also, the dignity of social assistance recipients is to be taken into account; people may not be treated as secondary citizens by reason of the fact that they rely on

36. Ibid. Consideration 123.
37. Watts (2018).
38. For example, by statutorily providing that in cases of extreme hardship authorities may refrain from giving sanctions. Consideration 185.

social assistance. In our view, this principle, which is somewhat hidden in normative legal texts,[39] is of major importance for countries in which a social assistance system has come into being. It featured prominently in the German sanctions case, where it was found that social assistance recipients are as entitled to human dignity as everyone else. Another human rights driver is the rights-based approach, which presupposes that the recipient of social assistance has a clear legal status with rights and obligations and is not merely at the mercy of policy practices of the local administration. This is an element which is frequently stressed in contemporary human rights documents and that appeared in the *FEANTSA* case.

As for the system, any element that may touch upon the above principles qualifies for critical scrutiny. While we came across sanctions and exclusions for certain groups, there are many other issues to be taken into account. The ECSR Digest of Case Law constitutes a valuable treasure chest of examples. But this Digest is not exhaustive. The human rights approach should be a guide for channelling new developments in the system: the digital welfare state which targets the poor with high tech surveillance techniques,[40] the rights of ethnic and religious minorities who rely on social assistance, and restrictive measures appearing in assistance programmes which respond to financial crises or other calamities. A rights-based approach is also vital in efforts to fight against poverty and social exclusion, moving us away from the old notions of state-sponsored charity, and towards ideals of social citizenship. These are all themes that operate as fuel for the further development of the substantive meaning of the human right of social assistance. This fuel should find its way not only to courts and human rights institutions which are competent to adjudicate on this right, but also to legislators and policymakers.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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39. The ECSR Digest of Case law contains a brief reference to his principle, as part of the case law on Article 13(2) ESC.
40. Gantchev (2019b).

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